

Effective June 1, 2015, Env-Or 800 reads as follows:**CHAPTER Env-Or 800 BROWNFIELDS PROGRAM UNDER RSA 147-F**

Statutory Authority: RSA 147-F:18

PART Env-Or 801 PURPOSE AND APPLICABILITY

Env-Or 801.01 Purpose. The purpose of these rules is to:

- (a) Establish procedures for implementation of the brownfields covenant program; and
- (b) Establish procedures for the voluntary cleanup of contaminated properties.

Env-Or 801.02 Applicability. Chapter Env-Or 800 shall apply to:

- (a) Any person who qualifies as eligible to participate in the brownfields covenant program in accordance with RSA 147-F:4, I;
- (b) Any environmentally-contaminated property that qualifies as an eligible property in accordance with RSA 147-F:4, II; and
- (c) Any other person who undertakes the investigation or remediation of a property in accordance with RSA 147-F:11 through RSA 147-F:16.

PART Env-Or 802 DEFINITIONS

Env-Or 802.01 “Applicant” means any person applying for a brownfields covenant program eligibility determination.

Env-Or 802.02 “Brownfields covenant program” means the program established under RSA 147-F to provide liability protection in the form of a covenant not to sue for eligible persons.

Env-Or 802.03 “Brownfields program” means the combined brownfields covenant program and the voluntary cleanup program established under RSA 147-F:5, V.

Env-Or 802.04 “Contaminant” or “contamination” means “contaminant” or “contamination” as defined in RSA 147-F:3, III, as reprinted in Appendix B. For the purpose of the brownfields program established in RSA 147-F, the term excludes materials contained in building products located in or on a building, such as lead paint or asbestos insulation.

Env-Or 802.05 “Covenant not to sue” means a document issued by the New Hampshire department of justice pursuant to RSA 147-F:6 that restricts the state’s right to sue eligible persons for contamination addressed by an approved remedial action plan.

Env-Or 802.06 “Eligibility determination” means the determination made pursuant to RSA 147-F:10, I, that the applicant is an eligible person and the property is eligible property.

Env-Or 802.06 “Eligible person” means “eligible person” as defined in RSA 147-F:3, V, as reprinted in Appendix B.

Env-Or 802.07 “Eligible property” means an environmentally-contaminated property that meets the criteria established in RSA 147-F:4, II.

Env-Or 802.08 “Imminent hazard” means “imminent hazard” as defined in RSA 147-A:2, IX, as reprinted in Appendix B.

Env-Or 802.09 “Person” means “person”, as defined in RSA 147-F:3, VI, as reprinted in Appendix B.

Env-Or 802.10 “Program participant” means “program participant”, as defined in RSA 147-F:3, VIII, as reprinted in Appendix B.

Env-Or 802.11 “Site” means “site” as defined in Env-Or 602.

PART Env-Or 803 APPLICATION FOR BROWNFIELDS COVENANT PROGRAM

Env-Or 803.01 Application for Participation. Any owner or prospective purchaser of contaminated property may request to participate in the brownfields covenant program by completing and filing a brownfields covenant program application form obtained from the department to obtain an eligibility determination.

Env-Or 803.02 Application Filing.

(a) The applicant shall submit one complete application as specified in Env-Or 803.03 to the department.

(b) The applicant shall submit a separate application for each site for which an eligibility determination is being requested.

Env-Or 803.03 Content of Application; Updates Required.

(a) A complete application shall consist of:

(1) If filed by the current owner, a completed current owner Brownfields Covenant Program Application form, NHDES-S-02-001, dated 2015, that has been signed as specified in Env-Or 803.04;

(2) If filed by a prospective purchaser, a completed prospective purchaser Brownfields Covenant Program Application form, NHDES-S-02-002, dated 2015, that has been signed as specified in Env-Or 803.04;

(3) The information specified in RSA 147-F:9, II(a)-(d);

(4) The fee required by RSA 147-F:9, II(e); and

(5) The certifications required by RSA 147-F:9, II(f).

(b) If facts or circumstances change prior to the department’s issuance of an eligibility determination in such a way as to render the information contained or representations made in an application incorrect in light of such new facts and circumstances, the applicant shall promptly notify the department and correct any such information or representations.

Env-Or 803.04 Signature Requirements.

(a) An applicant who is an individual shall sign and date the application.

(b) If the applicant is other than an individual, the application shall be:

(1) Signed and dated by the individual who is duly authorized to sign for the applicant; and

(2) Accompanied by evidence that the individual is authorized to sign the application on behalf of the entity filing the application.

Env-Or 803.05 Notice of Application Filing.

(a) As required by RSA 147-F:9, III, the applicant for an eligibility determination shall provide notice of the application to owners of adjacent property and a complete copy of the application to the governing body of the municipality in which the property is located when the application is submitted to the department.

(b) The applicant shall certify to the department in writing that the applicant has complied with (a), above.

Env-Or 803.06 Review of Application Completeness.

(a) The department shall review the application for completeness as provided in RSA 147-F:9, IV.

(b) If the applicant does not respond to a notice sent by the department to the applicant that the application is incomplete, the department shall deny the application.

PART Env-Or 804 ELIGIBILITY DETERMINATIONS

Env-Or 804.01 Determination of Eligibility. The department shall make a determination of eligibility as provided in RSA 147-F:10, I.

Env-Or 804.02 Notification of Eligibility Determination. The department shall send a written determination of eligibility to the applicant and the municipality within which the property is located as specified in RSA 147-F:10, I and II.

Env-Or 804.03 Review If Eligibility Denied. The applicant may request in writing a review of an eligibility denial as provided in RSA 147-F:10, III.

PART Env-Or 805 PROGRAM FEES

Env-Or 805.01 Application Fee.

(a) Brownfields covenant program applicants shall pay the nonrefundable application fee specified in RSA 147-F:14, I, to the department at the time of application.

(b) As required by RSA 147-F:14, I, any person who resubmits an application pursuant to RSA 147-F:9, IV shall pay the fee specified in RSA 147-F:14, I, for each resubmission.

(c) As specified in RSA 147-F:14, I, state and local governments including school districts shall be exempt from this fee.

Env-Or 805.02 Initial Program Participation Fee.

(a) As required by RSA 147-F:14, II, any eligible person who has paid the initial application fee and any person who becomes a program participant under RSA 147-F:5, V, shall pay the nonrefundable fee specified in RSA 147-F:14, II.

(b) The person shall pay the fee to the department within 30 days of:

(1) Issuance of an affirmative eligibility determination, for brownfields covenant program participants; or

(2) Issuance of a letter of acceptance, for voluntary cleanup program participants.

Env-Or 805.03 Additional Program Fees.

(a) As required by RSA 147-F:11, III, the program participant shall pay the costs associated with public notice of the remedial action plan pursuant to Env-Or 810.02(a) and the costs of any public information meetings or hearings held pursuant to Env-Or 810.02(c) and (d) in addition to the application and program participation fees. The program participant shall pay such costs within 30 days of the date of the department's written request for payment.

(b) All department costs exceeding the initial participation fee required by RSA 147-F:14, II, shall be charged to the program participant as provided in RSA 147-F:14, III.

Env-Or 805.04 Payment of Fees.

(a) All fees shall be non-refundable.

(b) Fees paid by check or money order shall be made payable to "Treasurer, State of NH."

PART Env-Or 806 WITHDRAWAL FROM THE BROWNFIELDS COVENANT PROGRAM

Env-Or 806.01 Eligibility and Process for Withdrawing from the Brownfields Covenant Program.

(a) Pursuant to RSA 147-F:8, I, a program participant may withdraw from the brownfields covenant program at any stage before or after approval of the remedial action plan.

(b) To withdraw from the brownfields covenant program, the program participant shall:

(1) File a written notice of intent to withdraw with the department as provided in RSA 147-F:8, I(a);

(2) Submit to the department a written site stabilization plan prepared in accordance with Env-Or 806.02.

(3) Fully implement the site stabilization plan as required by RSA 147-F:8, I(b) upon department approval of the plan submitted pursuant to (2), above;

(4) Provide the department with the documents and information relating to the performance of site investigation or remedial activities at the property that are required to be submitted under RSA 147-F:16, I(c); and

(5) Pay all outstanding program fees as required by RSA 147-F:8, I(c).

Env-Or 806.02 Site Stabilization Plan.

(a) Prior to withdrawing from the program, the program participant shall submit a plan as required by RSA 147-F:8, I(b) to identify those actions that are proposed to be taken at the property to ensure that work conducted at the property has not increased risks to human health and the environment and to ensure that the property will not pose an imminent hazard to human health or the environment.

(b) The program participant shall submit the site stabilization plan no later than 30 days after filing a notice of intent to withdraw from the brownfields covenant program.

(c) The site stabilization plan shall contain the following:

(1) The site name and address and the site number assigned to the site by the department;

(2) A complete description of the nature and extent of contamination at the property;

(3) A summary of investigative activities completed to date;

- (4) The principal elements of the remedial action plan if one has been prepared;
- (5) A summary of remedial activities completed to date;
- (6) A schedule and description of activities specified in the remedial action plan that have not been completed;
- (7) A description of all physical changes made to the property during participation in the brownfields covenant program;
- (8) A description of work the program participant proposes to address all imminent hazards at the property;
- (9) A description of work the program participant proposes to address any increased risk to human health and the environment that resulted from activity at the property during participation in the brownfields covenant program; and
- (10) A schedule for implementation of the proposed site stabilization.

Env-Or 806.03 Review of Site Stabilization Plan.

- (a) The department shall complete its review of the proposed site stabilization plan within 60 days of receipt.
- (b) If the plan does not contain the information specified in Env-Or 806.02(c) or does not ensure that no imminent hazards or increased risks to human health or the environment will occur, the department shall provide written comments to the program participant that identify the deficiency(ies).
- (c) Within 30 days of issuance of the department's comments, the program participant shall file an amended site stabilization plan that addresses the comments.
- (d) Once the department determines that the plan will ensure that no imminent hazards or increased risks to human health or the environment will occur, the department shall issue a written approval of the plan to the program participant.
- (e) Upon department approval of the site stabilization plan as submitted or as amended, the program participant shall implement all activities specified in the plan in accordance with the plan's schedule.

PART Env-Or 807 TRANSFER OF BROWNFIELDS COVENANT PROGRAM PROPERTIES

Env-Or 807.01 Transfer to Successor Owner. A successor owner may participate in the brownfields covenant program as provided in RSA 147-F:17, I.

Env-Or 807.02 Transfer Before Approval of a Remedial Action Plan. As specified in RSA 147-F:17, II, if the transfer of the property is made before approval of a remedial action plan, the successor owner, upon receipt of an affirmative eligibility determination and payment of the program participation fee, shall become a program participant as provided in RSA 147-F:17, II(a) through (c).

Env-Or 807.03 Transfer After Approval of Remedial Action Plan. As specified in RSA 147-F:17, III, if transfer of the property is made after approval of the remedial action plan but before a certificate of completion in accordance with RSA 147-F:13 is issued, the successor owner, after receipt of an affirmative eligibility determination and payment of the program participation fee, shall become a program participant as provided in RSA 147-F:17, III(a) through (c).

Env-Or 807.04 Transfer After Certification of Completion. If transfer of the property is made after certification of completion in accordance with RSA 147-F:13, the provisions of RSA 147-F:17, IV shall apply.

PART Env-Or 808 SUBDIVISION OF BROWNFIELDS COVENANT PROGRAM PROPERTIES

Env-Or 808.01 Subdivision Prior to Remedial Action Plan Approval.

(a) If an eligible property is subdivided prior to remedial action plan approval, the program participant shall:

- (1) Provide the department with a surveyed plan of the subdivision that has been approved by the municipality in which the property is located and, if applicable under RSA 485-A:29-44, the department; and
- (2) Prepare either a single remedial action plan that addresses all lots or a separate remedial action plan for each lot.

(b) If the program participant elects to prepare a single remedial action plan for all lots, the notice of approved remedial action plan issued pursuant to Env-Or 810.03(e) shall reference all lots.

(c) If the program participant elects to prepare a separate remedial action plan for each lot, a separate notice of approved remedial action plan shall be issued for each lot.

Env-Or 808.02 Subdivision After Remedial Action Plan Approval.

(a) If an eligible property is subdivided after remedial action plan approval but before issuance of a covenant, the program participant shall provide the department with a surveyed plan of the subdivision that has been approved by the municipality in which the property is located and, if applicable under RSA 485-A:29-44, the department and:

- (1) Implement the approved remedial action plan for all lots; or
- (2) Prepare, submit for approval in accordance with Env-Or 810.01, and implement a separate remedial action plan for each lot.

(b) If the program participant elects to implement the approved remedial action plan for all lots, the certificate of completion issued pursuant to RSA 147-F:13, III and the covenant not to sue issued pursuant to RSA 147-F:6 shall reference all lots and the approved remedial action plan.

(c) If the participant elects to prepare and implement a separate remedial action plan for each lot, a separate certificate of completion and covenant not to sue shall be issued for each lot.

Env-Or 808.03 Subdivision After Issuance of Covenant Not to Sue. If the eligible property is subdivided prior to the recordation of the covenant not to sue, the property owner shall record the covenant not to sue and certificate of completion in the registry of deeds in the chain of title for each of the subdivided properties.

PART Env-Or 809 SITE INVESTIGATION

Env-Or 809.01 Site Investigation Work Plan.

(a) As required by RSA 147-F:11, I, the program participant shall submit a site investigation work plan to the department. The plan shall be submitted as specified in the eligibility determination issued pursuant to Env-Or 804.02.

(b) The work plan shall describe the proposed scope of work that will result in a site investigation that conforms to the site investigation requirements specified in Env-Or 606.01(b) and a report that conforms to the requirements of RSA 147-F:11, V and the site investigation report requirements specified in Env-Or 606.03.

- (c) As provided in RSA 147-F:11, IV, after reviewing the work plan the department shall:
 - (1) Approve the plan, if the plan will result in a site investigation that conforms to the requirements specified in Env-Or 606.01(b) and a report that conforms to the requirements of RSA 147-F:11, V and Env-Or 606.03;
 - (2) Approve the plan with conditions, if conditions are required in order for the plan to result in a site investigation that conforms to the requirements specified in Env-Or 606.01(b) and a report that conforms to the requirements of RSA 147-F:11, V and Env-Or 606.03; or
 - (3) Disapprove the work plan, if the plan will not result in a site investigation that conforms to the requirements specified in Env-Or 606.01(b) and a report that conforms to the requirements of RSA 147-F:11, V and Env-Or 606.03 and conditions cannot be added so as to cause the plan to do so.
- (d) The department shall notify the program participant in writing of its decision on the proposed plan. If the plan is not approved, the notice shall specify the reason(s) for the disapproval.

Env-Or 809.02 Site Investigation Report.

- (a) The program participant shall submit to the department a site investigation report that meets the requirements of RSA 147-F:11, V and Env-Or 606.03.
- (b) As provided in RSA 147-F:11, VI, after reviewing the report the department shall:
 - (1) Approve the report, if it conforms to the requirements specified in RSA 147-F:11, V and Env-Or 606.03; or
 - (2) If the report cannot be approved pursuant to (1), above, require such revisions, additional investigations, or both, as are needed to bring the report into compliance.
- (c) If after approving the report the department determines that further action is not needed to protect public health or the environment, the department shall notify the program participant in writing that no further action is required, as authorized by RSA 147-F:11, VII.
- (d) As provided in RSA 147-F:11, VII, if the department approves the site investigation report and requests a remedial action plan, the program participant shall prepare a remedial action plan that meets the requirements of Env-Or 810 unless the program participant chooses to withdraw from the program.

PART Env-Or 810 REMEDIAL ACTION

Env-Or 810.01 Remedial Action Plan. A program participant who elects to continue pursuant to Env-Or 809.02(d) shall submit a remedial action plan that meets the requirements of RSA 147-F:11, VII(b) through (g) and the remedial action plan requirements specified in Env-Or 606.10 to the department.

Env-Or 810.02 Public Participation.

- (a) To comply with the public notice requirement of RSA 147-F:12, I, the department shall publish a notice of the proposed remedial action(s) on its web site and in at least one daily or weekly newspaper serving the municipality in which the site is located.
- (b) The notice required pursuant to (a), above shall contain:
 - (1) A brief description of the site and the proposed remedial actions;
 - (2) The address of the department office(s) and the local municipal office where the plan is available for review by members of the public;

(3) A department staff contact name, telephone number, and mailing address for submission of comments; and

(4) The closing date for receipt of public comments, which shall not be less than 30 days from the date of publication of the notice.

(c) The department shall conduct a public information meeting in accordance with the provisions of Env-C 200 that apply to non-adjudicative oral public hearings if it determines that:

(1) The site or proposed remedial actions, or both, have a significant environmental impact; or

(2) Based on public comments, there is a significant public interest in the site.

(d) The department shall provide public notice of the public information meeting by publishing notice of the date, time, and location of the meeting in at least one daily or weekly newspaper serving the municipality in which the site is located.

(e) The program participant shall cooperate with the department in conducting the public information meeting by attending and participating in the meeting.

Env-Or 810.03 Review and Approval of Remedial Action Plan.

(a) As provided in RSA 147-F:11, VIII, the department shall review the remedial action plan report and, after evaluation and consideration of public comments:

(1) Approve the plan, if the plan meets the criteria for approving remedial action plans specified in Env-Or 606.13;

(2) Approve the plan with conditions, if conditions are necessary to meet the criteria for approving remedial action plans specified in Env-Or 606.13; or

(3) Disapprove the remedial action plan, if the plan does not meet the criteria for approving remedial action plans specified in Env-Or 606.13 and conditions cannot be added so as to cause the plan to do so.

(b) As required by RSA 147-F:12, II, the department's approval shall identify the activities that must be completed before a certificate of completion will be issued.

(c) As provided in RSA 147-F:12, IV, the department shall require activity and use restrictions (AURs) on the redevelopment and use of the property if such AURs are necessary to achieve or maintain protection of human health and the environment during and after completion of the remedial action plan.

(d) AURs shall be prepared and implemented in accordance with the requirements of Env-Or 608 relative to developing and implementing AURs.

(e) Upon meeting the criteria for approving remedial action plans specified in Env-Or 606.13, the department shall issue to the program participant a notice of approved remedial action plan as provided in RSA 147-F:12, V(a).

Env-Or 810.04 Recordation of Notice of Approved Remedial Action Plan.

(a) As required by RSA 147-F:12, VI, upon receipt of the notice of approved remedial action plan the program participant shall record the notice in the registry of deeds for the county in which the property is located, subject to Env-Or 808.01 or Env-Or 808.02, if applicable.

(b) The program participant shall submit a copy of the recorded notice to the department within 60 days of recordation.

Env-Or 810.05 Issuance of Covenant Not to Sue. Upon approval of the remedial action plan, a covenant not to sue shall be issued to the program participant as provided in RSA 147-F:12, V(b).

Env-Or 810.06 Remedial Action Implementation.

(a) Program participants shall implement the approved remedial action plan as specified in RSA 147-F:13, in accordance with the remedial action implementation requirements specified in Env-Or 606.15.

(b) The remedial action completion report required to be filed by RSA 147-F:13, III, shall conform to the remedial action implementation report requirements specified in Env-Or 606.17.

Env-Or 810.07 Certificate of Completion. Upon meeting the criteria for issuing a certificate of completion specified in Env-Or 609.01(b), the department shall issue to the program participant a certificate of completion as provided in RSA 147-F:13, III.

Env-Or 810.08 Recordation of Certificate of Completion and Covenant Not to Sue. As required by RSA 147-F:13, IV, upon issuance of a certificate of completion the program participant shall record the certificate of completion and the related covenant not to sue in the registry of deeds for the county in which the property is located, subject to Env-Or 808.03, if applicable.

Env-Or 810.09 Certificate of No Further Action. Upon meeting the criteria for issuing a certificate of no further action specified in Env-Or 609.02, the department shall issue to the program participant a certificate of no further action as described in RSA 147-F:13, V.

Env-Or 810.10 Recordation of Certificate of No Further Action. Upon issuance of a certificate of no further action, the program participant shall record the certificate of no further action in the registry of deeds for the county in which the property is located.

Env-Or 810.11 Voiding of Covenant Not to Sue.

(a) Subject to (c), below, if the department receives information suggesting that one or more of the bases for voiding a covenant not to sue specified in RSA 147-F:6, III(a)(1) through (4) has arisen, the department shall:

(1) Notify the holder of the covenant in writing; and

(2) As required by RSA 147-F:6, III(b), provide the holder with a reasonable opportunity to cure the noncompliance or to explain why there is no basis to void the covenant.

(b) If the holder does not cure the noncompliance or explain why there is no basis to void the covenant, the department shall initiate an adjudicative proceeding in accordance with the provisions of Env-C 200 applicable to adjudicative proceedings to void the covenant.

(c) A covenant shall be void if:

(1) As provided in RSA 147-F:6, III(b), the holder of the covenant knowingly violated any use restriction; or

(2) Any of the bases for the covenant being void specified in RSA 147-F:6, IV, are present.

APPENDIX A: STATUTES IMPLEMENTED

Rule Section(s)	State Statute(s) Implemented
Env-Or 800 (also see specific parts listed below)	RSA 147-F
Env-Or 803	RSA 147-F:9
Env-Or 804	RSA 147-F:10
Env-Or 805	RSA 147-F:14
Env-Or 806	RSA 147-F:8
Env-Or 807	RSA 147-F:17
Env-Or 808	RSA 147-F:13; RSA 147-F:15; RSA 147-F:17
Env-Or 809	RSA 147-F:11, I through VII
Env-Or 810	RSA 147-F:11, VII through IX, RSA 147-F:12, RSA 147-F:13, RSA 147-F:6, III and IV

APPENDIX B: STATUTORY DEFINITIONS**RSA 147-F:3:**

III. “Contaminant” or “Contamination” means hazardous waste, hazardous materials (without regard to whether transported in commerce), or oil, as defined in RSA 146-A:2, III.

V. “Eligible person” means a person who meets the criteria under RSA 147-F:4, I, and who qualifies for a covenant not to sue.

VI. “Person” means any individual, trust, firm, joint stock company, corporation (including a government corporation), partnership, association, limited liability company, municipality, commission, and the state or a political subdivision of the state.

VII. “Program” means the brownfields program established by this chapter.

VIII. “Program participant” means any person, whether or not eligible for the liability protections created by this chapter, who is approved by the department to use the remedial process prescribed by this chapter.

RSA 147-A:2

IX. “Imminent hazard” means any condition or practice which presents an immediate and substantial threat to human health or the environment.